UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20, SUBREGION 37

MATSON TERMINALS, INC., and HAWAII TEAMSTERS & ALLIED WORKERS UNION, LOCAL 996,	Case 20-CA-178312

BRIEF OF RESPONDENT MATSON TERMINALS, INC. TO ADMINISTRATIVE LAW JUDGE

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I. PRELIMINARY STATEMENT

This brief is respectfully submitted by Respondent Matson Terminals, Inc. ("Matson") in support of its position that the Complaint filed against it should be dismissed.

As detailed below, even though Matson's supervisors and senior supervisors (Teamsters) had performed barge menu work on the Big Island in prior years, Matson had an obligation to assign such work to the wharf clerks (ILWU): Such assignment is consistent with the wharf clerk collective bargaining agreement, the long-held understanding between Matson and the ILWU as to wharf clerk duties, and Matson's practices in related circumstances. In turn, because Matson was obligated to give the barge menu work to the wharf clerks, it had no duty to bargain about reassigning such work away from the supervisors and senior supervisors.

II. STATEMENT OF FACTS [1]

A. Matson's Operations

Matson provides its customers with stevedoring and marine terminal services, including the shipping and receipt of cargo. Jt. Mt at 6. Matson conducts such operations at its facilities on the island of Hawai`i aka the Big Island (where it has two ports, one at Hilo and one at Kawaihae), as well as the islands of Kauai, Maui, and Oahu. *Id.* at 6-7.

Matson conducts a "hub-and-spoke" operation, meaning that cargo from the West Coast is delivered to the Honolulu, Oahu port (the hub), and if the cargo needs to go to any of the neighbor islands (the spokes), it is then transported to that neighbor island on a barge (an unmanned vessel that has no engine but rather is towed usually by a tugboat). *Id.* at 7. At each of Matson's facilities, including on the Big Island, the stevedoring operations include, without limitation, loading cargo onto and unloading cargo from barges. *Id.*

Matson's barge fleet includes barges with cranes to move cargo containers, as well as one barge (the Waialeale) which is a roll-on/roll-off operation in that cranes are not used but rather all cargo is driven onto and off of the barge. *Id.*

B. Supervisors and Senior Supervisors (Teamsters)

Matson employs supervisors and senior supervisors. On May 27, 2016, the Board certified the Teamsters as the collective bargaining representative for such employees. *Id.* at 4. The certification of the Teamster is currently on appeal to the Court of Appeals for the District of

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[1] The record in this case is the Stipulated Record that was submitted in the parties' August 24, 2017 Joint Motion to Submit Stipulated Record to the Administrative Law Judge ("Joint Motion" or "Jt. Mt."). On August 25, 2017, Administrative Law Judge issued his Order Granting Joint Motion to Submit the Case to the Administrative Law Judge on a Stipulated Record and Order Setting Briefing Schedule.

Columbia. *Id.* at 5.[2] Nothing in these proceedings for Case 20-CA-178312, including but not limited to the Joint Motion, constitutes a waiver or limitation of any arguments being presented by Matson in its Petition for Review of the Board's Decision and Order in case 20-CA-187970. *Id.* at 8.

C. Wharf Clerks (ILWU)

Matson also employs wharf clerks. On the Big Island, Matson (whose Big Island nomenclature is Big Island Stevedores) has a wharf clerk collective bargaining agreement with the ILWU Local 142 ("CBA"). Jt. Mot. at 2, Jt. Ex. J.

The CBA specifies that wharf clerk duties include "all checking of cargo on vessels and on docks":

> 2.01 The provisions of this Agreement shall apply to all checking of cargo on vessels and on docks when such work is performed by employees of the Employer. . . .

Jt. Ex. J at 5. The CBA's 2008 LOU recognizes wharf clerks' jurisdiction with regard to "directing and executing the flow of cargo." Jt. Ex. J at 38.

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[2] The procedural history leading up to this appeal includes the following: On June 10, 2016, Matson filed a Request for Review of the Regional Director for Region 20's May 9, 2016, Direction and Direction of Election in case 20-RC-173297. Jt. Mot. At 4; Jt. Ex. E. On October 7, 2016, the Board denied Matson's Request for Review in case 20-RC-173297, albeit with a vigorous Dissent from Member Miscimarra. Jt. Mot. at 4; Jt. Ex. F. On November 9, 2016, the Teamsters filed charge 20-CA-187970 alleging that Matson refused to recognize and bargain with the Teamsters as the collective bargaining representative of the Unit. Jt. Mot. at 4. On April 7, 2017, the Board issued a Decision and Order in case 20-CA-187970, finding that Matson violated Section 8(a)(5) and (1) of the Act by Matson's failure and refusal to recognize and bargain with the Union. Jt. Mot. at 4. On April 28, 2017, Matson filed with the Court of Appeals for the District of Columbia a Petition for Review of the Board's Decision and Order in case 20-CA-187970. *Id.* at 5. On June 6, 2017, the Board filed with the Court of Appeals for the District of Columbia a Cross-Application for Enforcement of the Board's Order in case 20-CA-187970. *Id.* Matson's Petition for Review and the Board's Cross-Application for Enforcement are currently pending before the Court of Appeals for the District of Columbia. *Id.*

The CBA also makes clear that such wharf clerk duties can be expanded. For instance, Section 2.04 states as follows:

> 2.04 The above described work is not intended to be a complete listing of the wharf clerk's functions. When changes or additions are indicated the Employer and the Union will meet to reach agreement with respect to such proposed changes or additions.

Jt. Ex. J at 5.

Similarly, CBA Exhibit B, Section IV, states in part:

> The following procedures shall apply with respect to any proposed changes or additions in the Joint Union-Company Rules in accordance with the provisions of paragraph B of the Preamble to these Joint Union-Company Rules.
>
> 1. Officials of the Employer and of Local 142 shall meet immediately on the request of either party made in accordance with the provisions of the Preamble, and shall promptly attempt to reach agreement with respect to such proposed change or addition.

Jt. Ex. J at 32.

In prior instances, Matson and the ILWU have discussed and agreed upon evolving wharf clerk duties. For instance, in 2001, Matson in Hawai`i converted from a straddle carrier operation (in which straddle carriers picked up and put down cargo containers on the ground) to a wheeled operation (in which cargo containers were landed on trucks or trailers and taken to the container yard and parking in parking spaces). Jt. Mt. at 7. Around the time of this 2001 transition, Matson had ongoing discussions and understanding with the ILWU that wharf clerks were continuing to control the flow of cargo to and from the crane (*e.g.* handling the receipt of containers at the terminal, confirming the loading and discharge of containers on and off the vessels, confirming that any given discharged container was landed on a specific chassis). *Id.* at 7-8. Although this work was a continuance of existing duties, the wharf clerks in the

performance of such duties now would be using new technology, including mobile data terminals (MDTs), and also would be assigned to and physically situated near Matson's cranes. *Id.* at 8.

D. Wharf Clerk's performance of Barge Menu Work

"Barge menu work" performed on barges with cranes consists of communicating to crane operators over two-way radios as to which containers to load or off-load on the barge, and communicating to the rig drivers over two-way radios which chassis are to be brought to the barge to load or off-load containers on the barge. *Id.* at 5.

On the Big Island, Matson's barge menu work – as performed on barges with cranes – had exclusively been performed by supervisors or senior supervisors. *Id.*

However, for years, Matson's barge menu work has been performed by ILWU-represented wharf clerks under various other circumstances. To wit:

- Since at least 2012 on Oahu and the Big Island, ILWU-represented wharf clerks have performed menu-like work on Matson's barge without a crane – *i.e.,* the roll-on/roll-off Waialeale barge – by directing longshoremen drivers as to the sequence of moving wheeled cargo onto and off of that barge. *Id.* at 8.

- For at least the past 30 years at Matson's Kauai operations, ILWU-represented wharf clerks have performed the menu work for all of Matson's barges. *Id.*

- For at least the past 30 years, ILWU-represented wharf clerks exclusively have done the menu work for Matson's West Coast operations. *Id.* at 7.

Consistent with these practices, Matson and the ILWU prior to the Summer of 2016 had discussions about Big Island wharf clerk duties pursuant to the CBA. Due to those discussions, and since at least Summer 2016, the wharf clerks have been performing the menu work on all the barges at Matson's Oahu, Maui, and Big Island operations. *Id.* at 8. Specifically as to the Big Island, on around June 3, 2016, Matson transferred barge menu work performed on barges with cranes, previously performed by Teamsters employees, to the wharf clerks. *Id.* at 6.

The ILWU has had a contractual right to perform the barge menu work pursuant to the wharf clerk collective bargaining agreement between Matson and the ILWU. *Id.* at 7; Joint Exhibit J. In the assumption of menu work by the wharf clerks, there has not been a loss of productivity (*e.g.,* no loss of crane speed and efficiency). *Id.* at 8. In addition, nothing in the record indicates that the supervisors lost any hours or compensation as a result of these events, nor was there any such loss.

III. PROCEDURAL BACKGROUND

On June 14, 2016, the Teamsters filed the Charge in this case 20-CA-178312. Jt. Ex. A.

On June 23, 2016, the Teamsters filed the Amended Charge in this case 20-CA-178312. Jt. Ex. C.

On June 30, 2017, Region 20 issued the Complaint and Notice of Hearing.

On July 14, 2017, Matson issued its Answer to Complaint, denying that it had acted unlawfully.

On August 24, 2017, the parties filed the Joint Motion.

On August 25, 2017, the Administrative Law Judge issued the Order granting the Joint Motion.

IV. ARGUMENT

The General Counsel has the burden to show a violation of Section 8 of the National Labor Relations Act. *See* NLRB Rules & Regulations 101.10(b) ("The Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act").

In this instance, the General Counsel cannot meet his burden of showing that Matson's assignment of barge menu work to the wharf clerks violated Section 8. This is because Matson was contractually obligated to make such assignment. As set forth in the CBA, wharf clerk duties include "all checking of cargo on vessels" (Section 2.01); alternatively, the CBA also

recognizes their jurisdiction in "directing and executing the flow of cargo" (2008 LOU). On its face, this language covers the process of checking (ensuring) the proper loading and offloading of cargo, including communicating with/directing crane operators to make sure that cargo is moved as planned.[3]

This reading is supported by Matson's and the ILWU's longstanding agreement – which they expressly reaffirmed in 2001 – that wharf clerks "control the flow of cargo to and from the crane." This has historically encompassed the loading and discharge of containers (prior to 2001) and being situated under and assigned to cranes (as of 2001), and so it logically also encompasses communications with crane operators and rig drivers involved in such loading and discharge.

This reading is further supported by Matson's practice of having wharf clerks perform menu work on the West Coast and on Kauai for the past 30 years. *See Construction and General Laborers' Union Local No. 534, Laborers' International Union of North America, AFL-CIO-CLC*, 285 NLRB 202, 1987 NLRB LEXIS 347, *8-9 (NLRB 1987) (Dotson, dissenting) ("the common law of the shop has evolved as a useful tool for contract interpretation. Speaking specifically of labor arbitrators, but with equal applicability to the Board and courts, the Supreme Court referred to 'the practice of the industry and the shop' as 'equally a part of the collective

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[3] According to the Merriam-Webster Learner's Dictionary, the definition of "check" includes "to look at or in (a place) in order to find or get something or someone." http://www.learnersdictionary.com/definition/check (emphasis added).

According to the Collins Dictionary, the definition of "check" includes "the process of making sure that something is correct or satisfactory." https://www.collinsdictionary.com/us/dictionary/english/checking

bargaining agreement although not expressed in it'") (citing *Steelworkers v. Warrior & Gulf Co.*, 363 U.S. 574, 581 (1980)).

To the extent that General Counsel claims that there is a past practice precluding Big Island wharf clerks from performing barge menu work, the General Counsel cannot meet his burden of establishing such practice. *See Exxon Shipping Co.*, 291 NLRB 489, 1988 NLRB LEXIS 588, *21-22 (NLRB 1988) ("I do not believe that General Counsel has met his burden of proving an established past practice or understanding") (citing cases). It is well settled that a past practice requires awareness of the practice and unequivocal mutuality in assenting to it. *See Springfield Day Nursery and United Automobile, Aerospace and Agricultural Implement Workers of Am., AFL-CIO, Local 2322*, 362 NLRB No. 30, 2015 NLRB LEXIS 187, *92-93 (NLRB 2015) ("the facts do not demonstrate contractual authority or a past practice that 'unequivocally and specifically' reveals a mutual intention to permit" the employer's challenged conduct); *Riverside Cement Co. and Allied Workers Int'l Union, Division of the Int'l Bhd. of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO*, 296 NLRB 840, 1989 NLRB LEXIS 607, *6 (NLRB 1989) (stating that a past practice requires "mutual consent of the parties"); *BASF Wyandotte Corp.*, 278 NLRB 173, 180 (1986) ("It is implicit in establishing a past practice that the party which is being asked to honor it be aware of its existence"). In this instance, the record does not show that the ILWU was aware of, much less specifically consented to, the supervisors – rather than wharf clerks – performing barge menu work on the Big Island. To the contrary, the ILWU has long understood that its wharf clerks control the flow of cargo; ILWU wharf clerks have long performed such work on Kauai and the West Coast; and the ILWU talked to Matson about having its Big Island wharf clerks perform

such work. Accordingly, there is no past practice of the ILWU foregoing its contractual right to such work.

Alternatively, even assuming *arguendo* that barge menu work is not within the scope of CBA Section 2.01 (*e.g.*, "all checking of cargo") or has been waived by past practice, it was added by agreement between Matson and the ILWU. Such agreement is permitted by CBA Section 2.04 (recognizing that Section 2.01 duties are not exhaustive and that the parties "will meet to reach agreement with respect to such proposed changes or additions" to duties) and/or CBA Exhibit B, Section IV (recognizing that parties shall meet and "promptly attempt to reach agreement with respect to such proposed change or addition" to work rules). In fact, there have been prior expansions of the wharf clerk role in communications with longshoremen about the loading and unloading of cargo. For instance, in 2001, Matson and the ILWU expanded the wharf clerks' role in controlling the flow of cargo by assigning wharf clerks to and positioning them under the cranes. Since at least 2012, Big Island and Oahu wharf clerks have conducted menu-like work on the Waialeale barge by directing the drivers as to moving cargo on and off of that barge.

Accordingly, due to the wharf clerks' duties as defined in Section 2.01 – and, alternatively, as expanded under Section 2.04 or Exhibit B – Matson has a binding agreement with the ILWU to assign barge menu work to the wharf clerks.

In light of such obligation to the ILWU, it follows that Matson had no duty to give notice to or bargain with the Teamsters about the reassignment of such work away from the supervisors and senior supervisors. *See, e.g., Murphy Oil USA, Inc.*, 286 NLRB No. 104 (1987) (affirming rule that "Respondent was not only within its rights, but also legally bound to adopt a rule that complied with Federal Law. I, therefore, find no violation of Section 8(a)(5) by its unilateral

imposition of this rule"); *Exxon Shipping Company*, 312 NLRB No. 93 (1993) ("we find the Respondent was permitted to adopt a rule that complied with Federal maritime law. Accordingly, we find no violation of the Act"). It should also be noted that this reassignment of barge menu work away from the supervisors and senior supervisors has not caused any loss of compensation to them.

V. CONCLUSION

For the foregoing reasons, Matson respectfully requests that the Complaint filed herein against it be dismissed.

DATED: Honolulu, Hawaii, October 2, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 2, 2017, a true and correct copy of the foregoing document was duly served upon the following via electronic mail, to their last known address:

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